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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

PALANTIR TECHNOLOGIES INC., a
Delaware corporation,

Plaintiff,

vs.

MARC L. ABRAMOWITZ,
Defendant.

Case No.: 5:19-CV-06879-BLF

**DEFENDANT ABRAMOWITZ'S
OPPOSITION TO PLAINTIFF
PALANTIR'S ADMINISTRATIVE
MOTION TO STRIKE**

Date: N/A
Time: N/A
Courtroom 3 (5th Floor)
Judge: Honorable Beth Labson Freeman

1 In his Reply in Support of his Motion for Summary Judgment, Mr. Abramowitz argued that
 2 Palantir's assertion that its CEO, Dr. Alex Karp, had disclosed trade secrets to Abramowitz should
 3 be disregarded as an after-the-fact invention because, over the entire course of discovery, Palantir
 4 never identified Dr. Karp as one of its disclosing employees. (Indeed, it did not even identify him
 5 as an employee who even *knew* the trade secrets until May 3, 2022, *see* Dkt. 312-7 (Palantir's 6th
 6 Am. Resp. First Set of Interrogs. (May 3, 2022) at Response to No. 1)). To support disregarding Dr.
 7 Karp's newfound memory, Abramowitz cited, among other things, Federal Rule of Civil Procedure
 8 37(c)(1), which provides that, as a matter of fair play in discovery, a party's failure to disclose
 9 information can forfeit that party's right to use it later as evidence. *See Hoffman v. Constr. Prot.*
 10 *Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008). Palantir now takes issue with Abramowitz's
 11 mention of its discovery failure, arguing (i) that, under Local Rules 7-8 and 37-4, a Rule 37 issue
 12 must be separately raised, and thus that Abramowitz's above-noted argument should be stricken; or,
 13 alternatively, (ii) that it should have the opportunity to explain why there was no discovery failure
 14 (and hence no Rule 37 violation), which explanation it has already filed in the form of a Response to
 15 Defendant's Reply in Support of Motion for Summary Judgment. *See* Dkt. 329-1. For the reasons
 16 stated below, Mr. Abramowitz's request for exclusion is properly before the Court, and in the
 17 alternative, should the Court grant Palantir leave, Mr. Abramowitz should be given the chance to
 18 respond.

19 Under Rule 37(c)(1), the Court's authority to impose an exclusion for attempted use of
 20 undisclosed information is "self-executing" and "automatic." *Yeti by Molly, Ltd. v. Deckers Outdoor*
 21 *Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (citing Fed. R. Civ. P. 37 advisory committee's note
 22 (1993)); *Merchant v. Corizon Health, Inc.*, 993 F.3d 733, 740 (9th Cir. 2021). The Rule's self-
 23 executing nature is meant to provide a "strong inducement for disclosure of material" that must be
 24 disclosed pursuant to Federal Rule of Civil Procedure 26. *Id.*; *see* Fed. R. Civ. P. 37 advisory
 25 committee's note (1993).

26 While it is true that some courts, citing the Local Rules, have denied requests for Rule 37
 27 sanctions for not being set forth separately, those decisions have typically involved formal requests
 28 for "sanctions" in the form of attorney's fees and costs, not mere arguments to disregard evidence.

1 *See, e.g., Fee v. California*, No. C 08-1549 RMW (RS), 2009 WL 10736262, at *1 n.1 (N.D. Cal.
 2 Mar. 3, 2009); *Wolk v. Green*, No. C06-5025 BZ, 2007 WL 3203050, at *3 (N.D. Cal. Oct. 29, 2007);
 3 *In re eBay Seller Antitrust Litig.*, No. C 07-1882 JF (RS), 2009 WL 10694970, at *3 (N.D. Cal. July
 4 13, 2009). In sharp contrast, where a party invokes Rule 37 merely as a basis to disregard undisclosed
 5 evidence, courts have taken up the request even *without* a separate motion. *See, e.g., Huddleston v.*
 6 *City & Cnty. of San Francisco*, No. 16-CV-01998-JCS, 2017 WL 6059273, at *9 (N.D. Cal. Dec. 7,
 7 2017) (sustaining Rule 37 objections despite failure to file a separate motion); *Hernandez v. Polanco*
 8 *Enter., Inc.*, 19 F.Supp.3d 918, 933–34 & n.10 (N.D. Cal. 2013). Indeed, this very issue was directly
 9 addressed in *Carlson Produce, LLC v. Clapper*, where the court allowed the moving party to raise a
 10 Rule 37 argument in a summary judgment reply, holding that it would be “unjust” to allow the non-
 11 movant to rely on evidence it did not previously disclose in a last-ditch effort to create a dispute of
 12 material fact. No. 18-CV-07195-VKD, 2021 WL 292031, at *6 (N.D. Cal. Jan. 28, 2021). That is
 13 exactly what Abramowitz is arguing here.

14 Indeed, it is especially appropriate for the Court not to require a separate motion here, given
 15 that the timing of the forthcoming summary judgment hearing would have made compliance with
 16 the Local Rules impossible. Under Local Rule 7-2(a), motions must be noticed and served not less
 17 than thirty-five days before the hearing date. *See* Civ. L. R. 7-2(a). But Palantir’s Opposition
 18 containing the improper assertions about Dr. Karp was filed on June 30, 2022, just twenty-two days
 19 before the July 21 hearing on Abramowitz’s Motion. With his Reply Brief due on July 7th,
 20 Abramowitz had the choice of raising his Rule 37 argument in his Reply Brief or not raising it at all.
 21 Under those circumstances, the choice was clear. But should the Court nevertheless find that
 22 Abramowitz’s Rule 37 argument should have been separately raised, the Court can and should avoid
 23 prejudicing Mr. Abramowitz by allowing him to make that separate motion now, denying his present
 24 request without prejudice only. *See Davis v. Pinterest, Inc.*, No. 19-cv-07650-HSG (TSH), 2021 WL
 25 3045878, at *5 (N.D. Cal. July 20, 2021).

26 As alternative relief in the event that the Court does not strike Abramowitz’s Rule 37
 27 argument (as it should not), Palantir seeks leave to file a responsive brief explaining why its reliance
 28 on Dr. Karp’s declaration is proper under Rule 37. Palantir’s responsive briefing is essentially a sur-

1 reply, which courts generally view with disfavor, and are “not generally inclined” to permit absent
2 an articulation of good cause why such leave should be granted. *Garcia v. Biter*, 195 F. Supp. 3d
3 1131, 1134 (E.D. Cal. 2016). Notably, Palantir’s Administrative Motion does not even mention the
4 requisite showing that it is required to make to be granted leave, particularly since the motion could
5 be addressed instead during this week’s summary judgment argument.

6 Nonetheless, should the Court allow Palantir to file its “response,” Mr. Abramowitz requests
7 that the Court allow him to respond, as Palantir’s attempts to excuse its discovery gamesmanship are
8 meritless. *See* Attachment 1 (Defendant Abramowitz’s Reply to Plaintiff’s Response to Defendant’s
9 Reply in Support of Motion for Summary Judgment).

1 Dated: July 18, 2022

Respectfully submitted,

2 /s/ Jack P. DiCanio

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